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Christin Nirmal v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-161-04 OF 2017 (FJI)
MOHTARUDIN BAKI, SURAYA OTHMAN AND YEOH WEE SIAM
JJCA
12 JULY 2018

C

Civil Procedure — Application to refer question of law to Federal Court — General principle — Appellant charged with drug trafficking under Dangerous Drugs Act 1952 applied to High Court to refer three constitutional questions to Federal Court for determination — Questions were whether mandatory death penalty for drug trafficking offended certain articles of Federal Constitution and was ‘arbitrary and disproportionate without taking into account individual mitigating circumstances’ — Whether questions did not constitute a ‘special case’ under s 84 of the Courts of Judicature Act 1964 requiring reference to the Federal Court as they were not new but had been determined by high authority in previous cases — Whether High Court right to dismiss appellant’s application

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The appellant, a Fijian national, was charged in the High Court for a drug trafficking offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (‘the DDA’). The offence was punishable with the mandatory death penalty under s 39B(2) of the DDA. Pending the trial, the appellant applied under s 84 of the Courts of Judicature Act 1964 (‘the CJA’) to challenge the constitutionality of the mandatory death penalty by requiring the High Court to refer three constitutional questions to the Federal Court for its determination. The first two questions were whether the mandatory death penalty was inconsistent with arts 5(1) and 8 of the Federal Constitution and void under art 4(1) thereof. The third question was whether the said penalty was inconsistent with the Federal Constitution ‘for being arbitrary and disproportionate and failing to take into account individual mitigating circumstances’. The High Court dismissed the application and ordered the trial against the appellant to continue. The appellant, however, filed the instant appeal against the High Court’s decision to dismiss his application and confined his appeal to only the third constitutional question. The appellant argued that the mandatory death penalty was unconstitutional and void because, inter alia, Parliament, by passing a 1983 amendment, had taken away the court’s discretion to decide whether or not to impose the death penalty and made the sentence mandatory. By so doing, the appellant argued, Parliament had usurped the power of the court to determine the measure of punishment and this breached the doctrine of separation of powers inherent in the Federal Constitution. The respondent counter-argued that it was a policy decision of the Legislature to impose

mandatory death penalty to deter drug trafficking and it was not within the province of the court to question such a policy decision.

Held, unanimously dismissing the appeal and affirming the decision of the High Court:

- (1) It was clear from a reading of s 84 of the CJA that the test to be applied by the High Court to determine the appellant's application was whether there was a 'special case' which warranted it to refer the constitutional questions to the Federal Court for determination. The High Court had applied the correct test and did not err in deciding that the matter was not a 'special case' that required reference to the Federal Court. The questions raised were not new as could be seen from the numerous cases which had been decided on the matter (see paras 9–10 & 31).
- (2) The mere filing of the application by the appellant under s 84 of the CJA did not give him an automatic right, and create an automatic duty on the High Court, to have the purported constitutional questions referred to the Federal Court for determination if the application did not pass the 'special case' test stipulated under s 84 of the CJA and rr 32 and 33 of the Rules of the Federal Court 1995 (see para 36).
- (3) The function of the court was to interpret the law and not to declare the mandatory death penalty under the impugned provisions of the DDA as unconstitutional. It was the Legislature, as the policy-maker, which had to amend the DDA and abolish the mandatory death sentence if it thought that it was cruel and harsh or draconian and not in keeping with international trends or if it was inconsistent with the Federal Constitution 'for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances' (see para 39).

[Bahasa Malaysia summary]

Perayu, seorang warganegara Fiji, telah dituduh di Mahkamah Tinggi kerana kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Kesalahan itu boleh dihukum dengan hukuman mati mandatori di bawah s 39B(2) ADB. Sementara menunggu perbicaraan, perayu telah memohon di bawah s 84 Akta Mahkamah Kehakiman 1964 ('AMK') untuk mencabar keberlembagaan hukuman mati mandatori dengan menghendaki Mahkamah Tinggi merujuk kepada tiga persoalan perlembagaan kepada Mahkamah Persekutuan untuk keputusannya. Dua persoalan pertama adalah sama ada hukuman mati mandatori tidak konsisten dengan perkara 5(1) dan 8 Perlembagaan Persekutuan dan tidak sah di bawah perkara 4(1) yang sama. Soalan ketiga adalah sama ada hukuman tersebut tidak konsisten dengan Perlembagaan Persekutuan 'for being arbitrary and disproportionate and failing to take into account individual mitigating circumstances'. Mahkamah Tinggi telah menolak permohonan tersebut dan memerintakan perbicaraan

- A terhadap perayu diteruskan. Perayu, bagaimanapun, telah memfailkan rayuan ini terhadap keputusan Mahkamah Tinggi untuk menolak permohonannya dan mengehendkan rayuannya hanya kepada persoalan perlembagaan ketiga. Perayu berhujah bahawa hukuman mati mandatori tidak berperlembagaan dan tidak sah kerana, antara lain, Parlimen, dengan meluluskan pindaan 1983,
- B telah melupuskan budi bicara mahkamah untuk memutuskan sama ada atau tidak untuk mengenakan hukuman mati dan membuat hukuman itu mandatori. Dengan berbuat demikian, perayu berhujah, Parlimen telah merampas kuasa mahkamah untuk menentukan ukuran hukuman dan ini melanggar doktrin pengasingan kuasa Badan Perundangan untuk mengenakan
- C hukuman mati mandatori bagi mencegah pengedaran dadah dan ia bukan dalam bidang kuasa mahkamah untuk mempersoalkan keputusan polisi sedemikian.
- D **Diputuskan**, sebulat suara menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:
- (1) Ia adalah jelas daripada pembacaan s 84 KTJ bahawa ujian yang diguna pakai oleh Mahkamah Tinggi untuk menentukan permohonan perayu adalah sama ada terdapat 'special case' yang mewajarkannya merujuk
- E persoalan berperlembagaan tersebut kepada Mahkamah Persekutuan untuk keputusan. Mahkamah Tinggi telah mengguna pakai ujian yang betul dan tidak terkhilaf dalam memutuskan bahawa perkara tersebut bukan 'special case' yang perlu dirujuk kepada Mahkamah Persekutuan. Persoalan-persoalan yang ditimbulkan bukan baharu yang boleh dilihat
- F daripada pelbagai kes yang telah diputuskan berhubung perkara tersebut (lihat perenggan 9–10 & 31).
- (2) Hanya dengan pemfailan permohonan oleh perayu di bawah s 83 KTJ tidak memberikannya hak automatik, dan menjadikan kewajipan automatik ke atas Mahkamah Tinggi, untuk merujuk
- G persoalan-persoalan berperlembagaan yang dimaksudkan kepada Mahkamah Persekutuan bagi menentukan permohonan itu tidak lulu ujian 'special case' yang ditetapkan di bawah s 84 KTJ dan kk 32 dan 33 Kaedah-Kaedah Mahkamah Persekutuan 1995 (lihat perenggan 36).
- H (3) Fungsi mahkamah adalah untuk mentafsirkan undang-undang dan bukan untuk mengisytiharkan hukuman mati mandatori di bawah peruntukan ADB yang dipersoalkan sebagai tidak berperlembagaan. Ia adalah Badan Perundangan, sebagai pembuat polisi, yang perlu meminda ADB dan memansuhkan hukuman mati mandatori jika ia berpendapat
- I bahawa ia adalah kejam dan berat dan zalim dan tidak sejajar dengan trend antarabangsa atau jika ia tidak konsisten dengan Perlembagaan Persekutuan 'for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances' (lihat perenggan 39).]

Notes

For a case on application to refer question of law to Federal Court in general, see 2(1) *Mallal's Digest* (5th Ed, 2017) para 2094.

Cases referred to

- Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30, FC (refd)
B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)
Bachan Singh v State of Punjab (1980) 2 SCC 684, SC (refd)
Gan Boon Aun v PP [2016] 4 MLJ 265, FC (folld)
Godfrey Ngotho Mutiso v Republic [2010] eKLR Criminal Appeal No 17 of 2008, CA (refd)
Kigula v Attorney General of Uganda (21 January 2009, unreported) (refd)
Kigula v Attorney General of Uganda (10 June 2015, unreported), SC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (folld)
Mithu v State of Punjab 1983 SCR (2) 690, SC (refd)
Ong Ah Chuan v PP Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (folld)
Ooi Kean Thong & Anor v Public Prosecutor [2006] 3 MLJ 389; [2006] 2 CLJ 701, FC (refd)
PP v Lau Kee Hoo [1983] 1 MLJ 157, FC (folld)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
PP v Su Liang Yu [1976] 2 MLJ 128 (refd)
Reyes v The Queen [2002] 2 AC 235, PC (refd)
Watson v The Queen (Attorney General for Jamaica intervening) [2005] 1 AC 472, PC (refd)
Woodson v North Carolina 428 US 280 (1976), SC (refd)

Legislation referred to

- Constitution of the Republic of Singapore (1980 Reprint) [SG] arts 9(1), 12(1)
 Courts of Judicature Act 1984 ss 30, 30(1), 84, 84(1), (2)
 Dangerous Drugs Act 1952 ss 2(1), 39B(1)(a), (2)
 Federal Constitution arts 4, 4(1), 5, 8, 162, Part II
 Human Rights Commission of Malaysia Act 1999 ss 4(4), 2
 Misuse of Drugs Act (Cap 185, 2008 Rev Ed) [SG] s 17
 Misuse of Drugs Act 1973 [SG] ss 15, 29, Second Schedule
 Rules of the Court of Appeal 1994 r 76
 Rules of the Federal Court 1995 rr 32, 33

- Gopal Sri Ram (Chih Yan Leng and Damien Chan with him) (Rashid Zulkifli) for the appellant.*
Awang Armadajaya bin Awang Mahmud (Nurulhuda Nur'Aini bt Mohd Nor and Nurshafini bt Mustafha with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

A Yeoh Wee Siam JCA (delivering judgment of the court):

BACKGROUND FACTS

*The appellant's application***B**

[1] The appellant, a Fijian national, was charged in the Shah Alam High Court ('High Court') under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for drug trafficking which, upon conviction, is punishable with the mandatory death sentence pursuant to s 39B(2) of the same Act.

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[2] On 21 October 2016, the appellant filed a notice of motion under s 84 of the Courts of Judicature Act 1984 ('the CJA') seeking to challenge the validity of s 39B(1)(a) and s 39B(2) of the DDA for being inconsistent with arts 5 and 8 of the Federal Constitution ('application').

D*The three constitutional questions in the application*

E [3] The appellant by the application sought the High Court to refer the following three constitutional questions to the Federal Court regarding s 39B(1)(a), read together with s 39B(2) of the DDA ('the three questions'):

- F** (1) whether the mandatory death penalty for trafficking in a dangerous drug provided for by Section 39B of the DDA is inconsistent with Article 5(1) of the Federal Constitution which provides that '[n]o person shall be deprived of his life ... save in accordance with the law' and is therefore void under Article 4(1) of the Federal Constitution. ('first question');
- G** (2) whether the mandatory death penalty for trafficking in a dangerous drug provided for by Section 39B of the DDA is inconsistent with Article 8 of the Federal Constitution which provides that '[a]ll persons are equal before the law and entitled to the equal protection of the law' and is therefore void under Article 4(1) of the Federal Constitution. ('second question'); and
- H** (3) whether the mandatory death sentence for trafficking in a dangerous drug provided for by Section 39B of the DDA is inconsistent with the Federal Constitution for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances. ('third question').

DECISION OF THE HIGH COURT

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[4] On 31 March 2017, the High Court gave the decision to dismiss the application and ordered that the appellant's case be proceeded with at the trial as fixed.

APPEAL BEFORE THIS COURT

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[5] The appellants, by way of his notice of appeal dated 31 March 2017, appealed to this court against the whole of the decision of the High Court for dismissing the application on the three questions ('appeal').

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DECISION OF THIS COURT

[6] On 12 February 2018, after having heard the submissions of learned counsels of both parties and perused the appeal record, we made the unanimous decision to dismiss the appeal.

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GROUNDS OF OUR DECISION

Appeal limited to the third question

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[7] At the outset of the hearing, learned counsel for the appellant informed this court that the appellant conceded on the first and second questions and hence would not be appealing on those two questions. The appeal was therefore narrowed down and limited to only the third question.

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The applicable test

[8] Section 84 of the CJA provides as follows:

84 Reference of constitutional question by High Court

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- (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
- (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
- (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a *special case* which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
- (4) Where a Judge shall have stated a *special case* under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court. (Emphasis added.)

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A [9] It is clear from a reading of the above s 84, that the test to be applied by the High Court in order to determine the application is the test of whether the appellant's case is a 'special case' which warrants the High Court to refer the constitutional questions to the Federal Court for a decision.

B [10] From a perusal of the grounds of judgment ('judgment') of the learned High Court judge ('learned judge'), it is also clear that, amongst other reasons given, he had applied the correct test and decided that this is not a special case for the High court to refer the three questions to the Federal Court for a decision.

C *The appellant's submissions*

D [11] Regarding the third question, learned counsel for the appellant submitted that the mandatory death sentence which the court is required by the DDA to impose, upon conviction, is unconstitutional and void for the following reasons which have been succinctly stated in the 'appellant's speaking note':

E 2. Prior to its amendment in 1983, the DDA gave the Court a discretion on the issue of sentence by permitting an alternative between life imprisonment and death.

3. By ACT A553 passed in 1983, the Parliament removed the judicial discretion vested in the Court.

F 4. The said amendment is unconstitutional because it violates the doctrine of separation of powers. The Hansard in respect of the recent amendment restoring the original position accepts that the 1983 amendment is unconstitutional.

5. The power to determine guilt or innocence and power to determine the measure of punishment is a judicial power. See *Public Prosecutor v Dato' Yap Peng* [2AB Tab 19] and *DPP of Jamaica v Mollison* [2AB Tab 19].

G 6. The doctrine of separation of powers is part of the basic structure of the Constitution. (See *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [AB Tab 16] and *Indira Gandhi A/P Mutho v Pengarah Jabatan Agama Islam Perak* (AB Tab 13)).

H 7. The fact that there has been no conviction or death penalty in this case is irrelevant because the test for constitutionality is the possibility of infringement. (See *Chintaman Rao v The State of Madhya Pradesh* [3AB Tab 32] and *Romesh Thappar v The State of Madras* [3AB Tab 33]).

I 8. For the foregoing reasons, the mandatory death penalty which the Court is required to impose by virtue of the DDA is a violation of the judicial power of the Federation which is also part of the basic structure of the Constitution. The amending Act A553 is therefore unconstitutional and void. (See *Indira Gandhi A/P Mutho v Pengarah Jabatan Agama Islam Perak* [AB Tab 13]).

9. The Federal Court in *Gan Boon Aun (No 1)* [AB Tab 5] has held that the Court of Appeal has no power to refer questions of constitutional law to the former. That decision overlooks Rule 76 of Rules of the Court of Appeal 1994. In any event, this

Court is empowered to remit the matter to the High Court with a direction to refer.

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The respondent's submissions

[12] in brief, the learned deputy public prosecutor ('DPP' or 'the respondent') opposed the application on the following main grounds.

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[13] As decided by the Federal Court in many cases, and citing *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701, as one of them, 'the courts have been consistently applying the presumption of constitutionality in favour of impugned statutory provision and to succeed the onus is therefore on the party asserting otherwise to show' (see also Federal Court case, *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 and *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128).

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[14] Under art 4(1) of the Federal Constitution 'any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. The DDA was enacted in 1952, before Merdeka Day, and therefore not caught by art 4(1) to be declared as null and void.

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[15] The DDA was enacted in 1952. It is therefore governed by art 162 of the Federal Constitution. As an existing law, since it was not repealed, it shall continue in force on and after Merdeka Day, with such modifications and subject to any amendments made by federal or state law (see Federal Court case, *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 and Privy Council case in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 at p 171).

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[16] The primary object of death penalties in a drug trafficking offence is that society regards the offence with particular abhorrence and the death penalties should act as a deterrent, particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk. The distinction between cases of death penalties and non-death penalties are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which are the function of the Legislature to decide, and not of the judiciary (see the Privy Council decision in *Ong Ah Chuan v Public Prosecutor Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64).

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[17] Relying on the Federal Court case in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, it is for Parliament to decide on the policy of whether the impugned act is 'harsh or unjust', and not a question for judicial determination.

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A *Our consideration*

[18] The law regarding the constitutionality of the said mandatory death sentence under the DDA is trite, having regard to arts 4, 5, 8 and 162 of the Federal Constitution, and the long line of authorities as cited before us. Nonetheless, we considered the submissions of the appellant on the issues raised.

C [19] We agree with learned counsel for the appellant that the decision of the Federal Court in *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265 ought to be applied in the present case, in particular the following:

D [17] *It is our considered view that the Court of Appeal did not have the jurisdiction to hear the respondent's appeal against the decision of the High Court* given on 14 November 2011 in view of the provision of ss 30 and 84 of the CJA. In the present case the sessions court referred to the High Court under s 30 of the CJA on the constitutionality of 122(1) of the Act. The High Court declared s 122(1) of the Act unconstitutional and void. The Court of Appeal allowed the prosecution's appeal and ordered the said decision of the High Court be set aside. ...

E [21] We would take the view that under s 30 of the CJA the High Court judge has to consider and decide whether there is a question of constitutional issue on matters referred to it by the sessions court necessary for the determination of the proceedings before the sessions court. If there is none the High Court judge must send the case back for continued hearing before the sessions court. On the other hand *if the High Court finds that a decision on a question as to the effect of a provision of the constitution is necessary for the determination of the proceedings in the sessions court it is the duty of the High Court judge under s 84 to state the question which in the opinion of the High Court judge had arisen as to the effect of the provision of the constitution in the form of a special case which shall permit of an answer being given in the affirmative or the negative. Once that is done, the High Court judge shall transmit the special case to the Federal Court in accordance with the Rules of the Federal Court.*

G [22] *It is to be stated here that nowhere in ss 30 and 84 of the CJA is power given to the High court judge to determine a question which concerns the effect of a provision of the constitution which had arisen in the subordinate court and in respect of which the record of proceedings have been transmitted to the High Court by the subordinate court under s 30 of the CJA. That power belongs to the Federal Court.* (Emphasis added.)

H [20] The above case referred to s 30 of the CJA. Section 30(1) is the equivalent of s 84(1) of the CJA except that it is applicable to a reference of a constitutional question by a subordinate court to the High Court. Section 30 of the CJA provides, inter alia, as follows:

I 30 Reference of constitutional question by subordinate court

- (1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.

- (2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

[21] As referred to in *Gan Boon Aun*, and for completeness, we now cite rr 32 and 33 of the Rules of the Federal Court 1995 ('the RFC 1995'):

32 Reference by High Court

- (1) Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the Judge hearing such proceedings may make an order on such terms as may be just staying such proceedings to await the decision of such question by the Federal court.
- (2) An order staying proceedings under this rule may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may consider most suitable having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final disposal of the proceedings.

33 Special case

- (1) Where an order for stay of proceedings has been made under rule 32 the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case for the opinion of the Federal Court.
- (2) The question which has arisen shall be stated in a form which shall permit of an answer being given in the affirmative or the negative.
- (3) Every special case stated under the Rule shall be divided into paragraphs and shall concisely state such facts and shall include such documents as may be necessary to enable the Court to decide the question raised thereby and shall be signed by the Judge."

[22] We note further the following statement of the Federal Court in *Gan Boon Aun* at p 279:

[23] ... Again it is to be noted that rr 32(1) and (2) read with rr 33(1) and (2) of the RFC 1995 are substantially similarly worded as in the provision of s 84 of the CJA.

[24] It is our considered view that it is plainly obvious that the Legislature has intended to empower only the Federal Court to determine a question as to the effect of any provision of the constitution in a reference under s 30 of the CJA. The High Court does not have such power.

...

- A [26] It is further noted that rr 34, 35, 36, 37 and 38 under Part XI of the RFC 1995 entitled 'Special Constitutional Case' contained specific provisions on the mode of dealing with the said special cases.
- ...
- B [32] With respect we are not persuaded by the argument put forward by the learned DPP that the High Court is competent to decide and rule on the constitutionality of any matter transmitted to it by a subordinate court. It is clear now reading the provisions of ss 30 and 84 of the CJA together with the relevant provisions of the RFC 1995 that it is the intention of the Legislature that jurisdiction and power is vested with the Federal Court to decide on the constitutionality of any matter that
- C had arisen in the subordinate court and transmitted to the High Court. The High Court does not have the jurisdiction and power to decide on such constitutional issue. It only has the power to decide on such issue if the issue arises for the first time before itself.
- D [23] Based on *Gan Boon Aun*, we fully agree with the submissions of the appellant that the High Court has no jurisdiction to decide on the constitutionality of the third question in the application. Similarly, in the appeal before us, the Court of Appeal does not have the jurisdiction to decide
- E on the constitutionality of the same third question.
- [24] However, the issue before this court is whether the learned judge was plainly wrong in his exercise of discretion under s 84 of the CJA in not allowing the appellant's application and transmitting the third question to the Federal
- F Court for a decision.
- [25] In determining this issue, we bear in mind that the High Court decided, amongst others, that the third question is not a special case as stated in s 84 of the CJA where he had to refer the purported constitutional question to the
- G Federal Court. The learned judge did not think that the question or issue was raised for the first time to require it to be referred by the High Court to the Federal Court. He was guided to a large extent by the Federal Court decision in *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157 which followed the decision of the Privy Council in *Ong Ah Chuan v Public Prosecutor Koh Chai*
- H *Cheng v Public Prosecutor* [1981] 1 MLJ 64.
- [26] In *Ong Ah Chuan*, the Privy Council, on appeal from Singapore, dealt with the constitutionality of s 15 of the Misuse of Drugs Act 1973 ('the MDA') (No 5 of 1973) (now s 17 of the MDA (Cap 185, 2008 Rev Ed)), and the
- I mandatory death penalty under the said Act for certain offences. The appellants in that case contended that the presumption of trafficking under s 15 of the MDA violated art 9(1) of the Constitution of the Republic of Singapore (1980 Reprint) ('the Singapore Constitution') and that the

mandatory death penalty was arbitrary and violated art 12(1) of the Singapore Constitution. A

[27] Article 9(1) of the Singapore Constitution states that 'No person shall be deprived of his life or liberty save in accordance with law'. It corresponds with art 5 of the Federal Constitution of Malaysia on liberty of a person. B

[28] Article 12(1) of the Singapore Constitution states that 'All persons are equal before the law and entitled to the equal protection of the law'. It corresponds with art 8 of the Federal Constitution of Malaysia on equality. C

[29] In a nutshell, the Privy Council in *Ong Ah Chuan* held that the MDA, in particular s 15 (which provides for the rebuttable presumption of drug trafficking) and the provision in s 29 and the Second Schedule (which provide for the mandatory death penalty for drug trafficking) are not inconsistent with arts 9(1) and 12(1) of the Singapore Constitution. In the last two paragraphs of the judgment, Lord Diplock stated: D

In Their Lordships' view *there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine*. The minimum quantity that attracts the death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good Samaritan out of the kindness of his heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of the law and is the long-established constitutional way of doing so in Singapore as in England. E

In the instant cases the law required that sentences of death should be imposed. There is no substance in the contention that this requirement of the law is inconsistent with the Constitution. The appeals must be dismissed. (Emphasis added.) F

[30] In *Lau Kee Hoo*, the Federal Court considered the following question: G

Whether or not the mandatory death sentence provided under s 57(1) of the Internal Security Act 1960, is ultra vires and violates arts 5(1), 8(1) and 121(1) of the Federal Constitution.

The Federal Court then held, inter alia, as follows: H

Held: (1) it is clear from art 5(1) of the Federal Constitution that the Constitution itself envisages the possibility of Parliament providing for the death penalty so that it is not necessarily unconstitutional;

...

(4) Capital punishment is not unconstitutional per se. In their judicial capacities judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made; I

- A** (5) All criminal law involves classification of individuals for purpose of punishment. Equality before the law and equal protection of the law require that like should be compared with like. What art 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances. Everybody charged under s 57(1) of the Internal Security Act 1960, is liable to the same punishment and therefore it is not discriminatory;
- B** (6) It is the function of the Legislature not the judiciary to decide the appropriate punishment for persons charged under the Internal Security Act and the Arms Act. Provided that the factor which Parliament adopts as constituting the dissimilarity in circumstances which justifies dissimilarity in punitive treatment is not purely arbitrary but bears a reasonable relation to the object of the law there is no inconsistency with art 8(1) of the Constitution. Article 8(1) is concerned with equal punitive treatment for similar legal guilt, not with equal punitive treatment for equal moral blameworthiness;
- C**
- D** (7) there is nothing unusual in a capital sentence being mandatory and indeed its efficacy as a deterrent may be to some extent diminished if it is not.

- E** [31] Following *Ong Ah Chuan*, and *Lau Kee Hoo*, we are of the considered opinion that the learned judge was not plainly wrong, nor had he erred in fact or in law in deciding that the present case before him is not a special case under s 84 of the CJA which makes it imperative for him to refer the purported constitutional questions, in particular the third question, to the Federal Court for a decision. The questions are not new as can be seen from the numerous cases which have been decided on the matter.

- F** [32] The appellant further submitted that the court, in the exercise of its interpretative jurisdiction, shall also have regard to the Universal Declaration of Human Rights 1948 ('the UDHR') as an aid to interpreting Part II of the Federal Constitution. The UDHR has been statutorily recognised as such an aid for Malaysia's Human Rights Commission in its duties to uphold human rights in Malaysia (see ss 4(4) and 2 of the Human Rights Commission of Malaysia Act 1999). In this regard, s 39B(1)(a) of the DDA read together with s 39B(2) of the DDA fail to afford fundamental rights of due process in the imposition of the mandatory death sentence with the result that the sentence provided for by s 39B(1)(a) of the DDA read together with s 39B(2) of the DDA constitute an arbitrary deprivation of life. This is contrary to art 5 of the Federal Constitution.
- G**
- H**

- I** [33] The appellant further submitted that s 39B(1)(a) of the DDA read together with s 39B(2) of the DDA are incompatible with the requirement that the death penalty may only be imposed after a judicial hearing where the sentence is not mandated in advance and/or where all mitigating factors relevant to the individual and the commission of the offence may be taken into account by the court in determining whether such a penalty is appropriate in

the individual case. The said provisions result in arbitrary and grossly disproportionate penalties including by reason of the excessively broad definition of ‘trafficking’ in s 2(1) of the DDA.

A

[34] The appellant relied on several international law cases to emphasise the point that there is now an ‘emerging recognition that the imposition of the mandatory death penalty is cruel and/or inhuman and amounted to an arbitrary deprivation of life’ (see Indian Supreme Court cases of *Bachan Singh v State of Punjab* (1980) 2 SCC 684, and *Mithu v State of Punjab* 1983 SCR (2) 690, US Supreme Court case of *Woodson v North Carolina* 428 US 280 (1976), Belize Privy Council case of *Reyes v The Queen* [2002] 2 AC 235, Jamaica Privy Council case of *Watson v The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472, Uganda Constitutional Court and Supreme Court cases of *Kigula v Attorney General of Uganda* (dated 10 June 2015 and 21 January 2009 respectively, both unreported, but in the High Court ABOA Tab 19 at p 551), and the Kenya Court of Appeal case in *Godfrey Ngotho Mutiso v Republic* [2010] eKLR Criminal Appeal No 17 of 2008 (judgment dated 30 July 2010) (see High Court ABOA Tab 20 at p 629)).

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D

[35] The appellant submitted that reference to the Federal Court will resolve the dispute by speedy and economical end as provided in s 84(2) of the CJA.

E

[36] While we agree with the appellant’s submissions that both the High Court and this court have no jurisdiction to decide on constitutional question, we do not think that by the mere filing of the application under s 84 of the CJA, it is an automatic right of the appellant, and therefore the automatic duty of the High Court, to refer the purported constitutional questions to the Federal Court for a decision if the application did not pass the ‘special case’ test stipulated in s 84 of the CJA, and rr 32 and 33 of the RFC 1995.

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[37] We further considered the following r 76 of the Rules of the Court of Appeal 1994 (‘the RCOA’) which was cited to us by learned counsel for the appellant:

76 Ancillary powers of the Court

The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

H

I

[38] In the light of our decision holding that the learned judge was not plainly wrong in the exercise of his discretion in not finding the appellant’s case as a special case for the three questions to be referred to the Federal Court, we are not persuaded by learned counsel for the appellant that this court shall

A exercise its powers under r 76 of the RCOA in this appeal to refer the three questions to the Federal Court. Alternatively, neither do we think it necessary for us to order that the case be remitted to the High Court for the said court to refer the three questions, in particular the third question, to the Federal Court for a decision pending the trial.

B

[39] We are of the firm opinion that the function of the courts is to interpret the law, and not to declare the mandatory death penalty under the impugned provisions of the DDA as unconstitutional. It is the Legislature, being the policy-maker, which has to amend the DDA and abolish the mandatory death sentence if it thinks that it is cruel and harsh, and a draconian law which is not in keeping with international trends, and 'is inconsistent with the Federal Constitution for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances'.

D

[40] Finally, it is appropriate for us to restate what Raja Azlan Shah (as His Royal Highness then was) said in the celebrated Federal Court case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 188:

E The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* (1):

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G Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

H It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction' — per Roskill LJ in *Henry v Geopresco International Ltd* (2). Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Legislature, and not the courts, they have their remedy at the ballot box.

I

CONCLUSION

[41] Based on the foregoing considerations, we find no merit in the appeal. The appeal is dismissed and the decision and order of the High Court is affirmed.

Appeal dismissed unanimously and decision of the High Court affirmed.

Reported by Ashok Kumar

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